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In the Supreme Court of the United States

OCTOBER TERM, 1989

EASTERN NEBRASKA COMMUNITY OFFICE OF RETARDATION, ET AL., PETITIONERS

v.

PATRICIA ANN GLOVER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a policy requiring certain health care workers at petitioners' state mental health facilities to submit to blood tests for the hepatitis B virus (HBV) and the human immunodeficiency virus (HIV) effects an unreasonable search under the Fourth Amendment.

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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner Eastern Nebraska Human Services Agency (ENHSA) is a state agency dedicated to serving the needs of mentally retarded persons in

Nebraska. Petitioner Eastern Nebraska Community Office of Retardation (ENCOR), a subagency of ENHSA, operates a community based program providing "residential, vocational and other specialized services for the mentally retarded" (Pet. App. 7), serving a five-county area in the eastern part of the state. *Id.* at 24.

In 1987, ENHSA adopted Chronic Infectious Disease Policy No. 8.85, which requires certain health care workers at facilities operated by ENCOR to submit to mandatory testing, including blood testing, for tuberculosis (TB), hepatitis B (HBV), and human immunodeficiency virus (HIV) (Pet. App. 6, 24). The policy also imposes a reporting requirement on employees who know or suspect that they have any of those diseases, and requires that employees file a disclosure form if they have been hospitalized or are receiving treatment for any of the diseases (*id.* at 6-7).

ENHSA's stated purpose for Policy No. 8.85 is " 'the pursuit of a safe work environment for all employees and a safe training and living environment for all developmentally disabled persons receiving services from the [a]gency.' " Pet. App. 25. As revised in 1988 (see *id.* at 4), the policy covers those workers who have the most frequent contact with clients—including home teachers, residential associates, residential assistants, vocational program managers, vocational production managers, registered nurses, and licensed practical nurses (*id.* at 12, 25). "The rationale for testing these employees is ENHSA's concern that clients who engage in violent or aggressive behavior associated with their conditions, such as biting or scratching, risk contracting

one of the diseases from an infected employee" (*id.* at 25).[1]

Policy No. 8.85 requires testing for both new applicants (Pet. App. 31-33) and current employees (*id.* at 33-40). Under the terms of the policy, a refusal by an employee to submit to testing or otherwise to conform to the disclosure or reporting requirements constitutes grounds for disciplinary sanctions, including dismissal (*id.* at 33-34). If an employee tests positive for HIV or HBV, a second test will be administered to verify the results (*id.* at 34-35). If, after verification, the employee is found to have a chronic infectious disease, petitioners will attempt to place the employee in a position that involves less direct client contact. If that proves to be impossible, the employee will be removed from the work force and may be terminated from employment. *Id.* at 35-36.

2. Respondents commenced this class action suit in 1987, challenging the constitutionality of Policy No. 8.85. After the district court issued a temporary restraining order—enjoining all testing for HIV, as well as the reporting and disclosure requirements for all of the specified diseases—petitioners issued the present policy, revised as of January 1988. Respondents then challenged the revised policy, limiting their claims to the HIV and HBV requirements. Pet. App. 3-4 & n.1.

After an extensive hearing, the district court issued a permanent injunction (Pet. App. 3-22), concluding that Policy No. 8.85 violates the Fourth Amendment. The court explained that "[t]he mandatory testing required by the policy involves an in-

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[1] Petitioners adopted Policy No. 8.85 shortly after learning, in September 1987, that one ENCOR employee had died from AIDS (Pet. App. 11).

voluntary intrusion into the body by the State for the purposes of withdrawing blood and constitutes a search and seizure for purposes of the Fourth Amendment" (*id.* at 18). Accordingly, the court noted that it "must * * * determine whether the search meets the Fourth Amendment test of reasonableness"—an inquiry, it stated, that requires a court to "balance the 'nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the government interests alleged to justify the intrusion' " (*id.* at 18-19 (citations omitted)).

Applying that standard, the court held that Policy No. 8.85 effects an unreasonable search. The court acknowledged that "the AIDS 'epidemic' is a matter of great concern to the public and to the government" and that "[t]he presently devastating character of this disease is frightening to everyone" (Pet. App. 19). The court also recognized that "the pursuit of a safe work environment for employees and a safe training and living environment for all clients is a worthy one" (*id.* at 20). The court found, however, that petitioners' policy did not promote those purposes. Reviewing the record, the court stated that "even if staff members were infected with a chronic infectious disease, the risk to ENHSA's clients is extremely low and approaches zero" (*ibid.*). That is so, the court continued, because "[t]he medical evidence is overwhelming that the risk of transmission of the AIDS virus in the ENCOR work place is trivial to the point of non-existence" (*ibid.*). In particular, the court explained, in contrast to the "primary routes of transmission[]"—including sex-

ual contact,[2] sharing hypodermic needles, blood transfusions, transmission across the placenta from mother to fetus, and "prolonged exposure of broken skin to massive amounts of infected blood" (*id.* at 9)—only in "very rare instances" has the virus been transmitted to health care workers in the ordinary course of their duties (*ibid.*), usually through needle stick accidents (*id.* at 9-10). Still "more rarely", the court added, is the virus communicated through incidents that do not involve needle stick injuries, such as "contact with massive quantities of infected materials" (*id.* at 10).

In short, although it acknowledged that "there can be no guarantee that the ENCOR clients could not possibly contract the AIDS virus" (Pet. App. 20), the court concluded from the evidence that "[t]he risk of transmission of the disease from the staff to the clients at ENCOR is miniscule, trivial, extremely low, extraordinarily low, theoretical, and approaches zero" (*id.* at 21). The court made a similar finding with respect to the risk of contracting HBV; it also noted that instead of testing for HBV "ENCOR could administer the HBV immunization to its clients, and be prepared to administer the hepatitis B immune globulin to an unimmunized client who was exposed to the disease" (*ibid.*).

3. The court of appeals affirmed (Pet. App. 23-29). The court noted at the outset that "[m]andatory blood testing is a search and seizure," the reasonableness of which must be "measured by ' "balanc-

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[2] Based on the testimony at the hearing, the district court found "there is not a sexual abuse problem at ENCOR" (Pet. App. 13). Moreover, although there has been "some evidence of sexual abuse of clients at ENCOR" (*ibid.*), petitioners do not attempt to defend Policy No. 8.85 on that basis.

[ing] the nature and quality of the intrusion on the individual's [f]ourth [a]mendment interests against the importance of the governmental interests alleged to justify the intrusion" ' " (*id.* at 26-27 (brackets in original)). Applying that standard, the court found Policy No. 8.85 to be constitutionally unreasonable. The court acknowledged the "severe nature of the diseases at which ENHSA's policy is aimed" (*id.* at 28). After "carefully review[ing] the record" (*ibid.*), however, the court concluded that the district court's finding—that there was a "trivial" risk of transmitting the two diseases to ENCOR clients—was not clearly erroneous (*ibid.*). Without "intend-[ing] [a] broad-based rule with regard to testing public employees for any infectious disease, including AIDS" (*ibid.*), the court therefore held that "under the facts established in this case, the district court properly enjoined ENHSA's policy as an unreasonable search and seizure under the fourth amendment" (*id.* at 28-29).

DISCUSSION

Petitioners ask this Court to review two questions in this case. First, they contend (Pet. 9-15), the Court should resolve the question whether a governmental agency must satisfy a probable cause standard before it may test its employees for infectious diseases. Second, they assert, the Court should address the question whether an employee's "right to privacy in information concerning medical conditions" outweighs the governmental interest in a safe working environment for employees and patients. Neither question, however, is presented by the court of appeals' decision. To the contrary, the court's decision is a routine application of settled Fourth

Amendment principles to the special facts in the record below. The court's application of those principles to the record in this case has not been challenged by petitioners, and the critical findings made by the court in reaching its decision appear to be consistent with the federal government's own findings and regulations. For those reasons, we believe that the petition for a writ of certiorari should be denied.

1. a. "The fundamental command of the Fourth Amendment is that searches and seizures be reasonable." *New Jersey* v. *T.L.O.*, 469 U.S. 325, 340 (1985). See *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 537 (1985); *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 588 (1983). Thus, "the Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable." *Skinner* v. *Railway Labor Executives' Ass'n*, 109 S. Ct. 1402, 1414 (1989). See *Carroll* v. *United States*, 267 U.S. 132, 147 (1925). The test of reasonableness, moreover, "is not capable of precise definition or mechanical application." *Bell* v. *Wolfish*, 441 U.S. 520, 559 (1979). See *Graham* v. *Connor*, 109 S. Ct. 1865, 1871 (1989). Rather, in defining the contours of the right to be free from unreasonable searches and seizures, this Court has repeatedly said that " 'the specific content and incidents of this right must be shaped by the context in which it is asserted.' " *Wyman* v. *James*, 400 U.S. 309, 318 (1971) (quoting *Terry* v. *Ohio*, 392 U.S. 1, 9 (1968)). See also *New Jersey* v. *T.L.O.*, 469 U.S. at 337 ("what is reasonable depends on the context within which a search takes place").

The Court has established a balancing test to govern this inquiry. "[T]he permissibility of a particular practice 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against

its promotion of legitimate governmental interests.'" *Skinner* v. *Railway Labor Executives' Ass'n*, 109 S. Ct. at 1414 (quoting *Delaware* v. *Prouse*, 440 U.S. 648, 654 (1979)). See also *Camara* v. *Municipal Court*, 387 U.S. 523, 536-537 (1967). This approach recognizes that not every invasion of privacy is prohibited by the Fourth Amendment, but only "arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 554 (1976). "Where a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, [the Court has] not hesitated to adopt such a standard." *New Jersey* v. *T.L.O.*, 469 U.S. at 341.

Applying that test, the Court has held that in the context of an ordinary criminal investigation both probable cause and a warrant are generally necessary to render a search reasonable. See *United States* v. *Karo*, 468 U.S. 705, 717 (1984); *United States* v. *United States District Court*, 407 U.S. 297, 317 (1972). But as the Court explained recently in *Skinner* v. *Railway Labor Executives' Ass'n*, 109 S. Ct. at 1414 (citation omitted), exceptions from those requirements have been permitted "when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'" Where, for example, "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search," *Camara* v. *Municipal Court*, 387 U.S. at 533, the Court has consistently held that a warrant is not

required by the Fourth Amendment.[3] Similarly, the Court has found that the probable cause standard is inappropriate where it would defeat the purposes that the search is designed to achieve.[4]

b. The court of appeals applied those principles in evaluating the reasonableness of Policy No. 8.85. The court correctly noted, at the outset, that blood tests constitute a search for purposes of the Fourth Amendment. See *Skinner* v. *Railway Labor Execu-*

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[3] See, *e.g.*, *Skinner* v. *Railway Labor Executives' Ass'n*, 109 S. Ct. at 1416 ("the delay necessary to procure a warrant * * * may result in the destruction of valuable evidence"); *National Treasury Employees Union* v. *von Raab*, 109 S. Ct. 1384, 1391 (1989) (the mission of the Customs Service "would be compromised if it were required to seek search warrants in connection with routine, yet sensitive, employment decisions"); *Griffin* v. *Wisconsin*, 483 U.S. 868, 876 (1987) ("[a] warrant requirement would interfere to an appreciable degree with the probation system, setting up a magistrate rather than the probation officer as the judge of how close a supervision the probationer requires"); *New Jersey* v. *T.L.O.*, 469 U.S. at 340 (a warrant requirement "would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools"); *O'Connor* v. *Ortega*, 480 U.S. 709, 722 (1987) (plurality opinion) ("requiring an employer to obtain a warrant whenever the employer wished to enter an employee's office, desk, or file cabinets for a work-related purpose would seriously disrupt the routine conduct of business and would be unduly burdensome").

[4] See, *e.g.*, *Griffin* v. *Wisconsin*, 483 U.S. at 878 (a probable cause standard "would reduce the deterrent effect of the supervisory arrangement"); *O'Connor* v. *Ortega*, 480 U.S. at 724 (plurality opinion) ("[t]he delay in correcting the employee misconduct caused by the need for probable cause rather than reasonable suspicion will be translated into tangible and often irreparable damage to the agency's work, and ultimately to the public interest"); *New Jersey* v. *T.L.O.*, 469 U.S. at 340-342.

tives' Ass'n, 109 S. Ct. at 1412; *Schmerber* v. *California*, 384 U.S. 757, 767-768 (1966). See also *Winston* v. *Lee*, 470 U.S. 753, 760 (1985). Turning to the reasonableness of the tests, the court " 'balanc[ed] the nature and quality of the intrusion on the individual's [f]ourth [a]mendment interests against the importance of the governmental interests alleged to justify the intrusion' " (Pet. App. 26-27 (citation omitted)). In light of the factual record—showing the risk of transmission to be " 'extraordinarily low' " (*id.* at 28)—the court concluded that the asserted governmental interests did not justify petitioners' testing program.

Petitioners contend that the courts below erred "[b]y applying the standard warrant and probable cause requirement" (Pet. 15). But neither the district court nor the court of appeals insisted on a warrant or probable cause. Indeed, the opinions below do not even mention the words "warrant" or "probable cause." The simple fact that the courts below focused on the "probabilities of transmission" (Pet. 14) does not mean that those courts "applied the improper legal standard of probable cause" (*ibid.*). The Fourth Amendment requires courts to assess whether a particular search "is a sufficiently productive mechanism to justify the intrusion upon Fourth Amendment interests which [the search] entail[s]" (*Delaware* v. *Prouse*, 440 U.S. 648, 659 (1979); see also *National Treasury Employees Union* v. *von Raab*, 109 S. Ct. 1384, 1394-1395 (1989)); but undertaking such an inquiry, as the courts below properly did, does not amount to the application of a "probable cause" standard. There is, accordingly, no reason to review the first question presented in the petition—whether an agency must satisfy a "probable cause" standard

before it may implement a testing program for infectious diseases.

Petitioners also contend (Pet. 16-19) that the decision below "affords a clear opportunity to squarely address the issue of whether and to what extent a privacy interest exists in certain medical information" (Pet. 19). In petitioners' view, the "lower courts are widely divided" on that question (Pet. 16), and the issue "is ripe for review by this Court" (Pet. 19). But again, that issue is simply not in the case. The court of appeals did not mention, let alone endorse, any "broadly conceived privacy right" (Pet. 18) in "medical information"; it simply acknowledged, quite correctly, that a blood test constitutes a search and must therefore be reasonable under the Fourth Amendment. Petitioners' reliance (Pet. 17-18) on a series of district court decisions involving the "right to privacy in information" (Pet. 16) is therefore misplaced.

2. In short, the two questions posed by petitioners are not presented by the decision below. Instead, that decision simply applies settled Fourth Amendment principles to the record at hand. And petitioners do not quarrel with the lower courts' assessment of that record.

The findings obtained by the federal government in its own research generally appear to confirm the record below. As noted in a 1987 recommendation prepared by the Centers for Disease Control, Public Health Service (CDC), the transmission of HIV from infected health-care workers to patients "would be expected to occur only very rarely." *Recommendations for Prevention of HIV Transmission in Health-Care Settings*, 36 Morbidity and Mortality Weekly Report 15S (Supp. Aug. 21, 1987) [hereinafter *Rec-*

ommendations]. Moreover, while the same recommendation notes that "[t]ransmission of hepatitis B virus (HBV) * * * from health-care workers to patients has been documented," such transmission "has occurred in situations * * * in which health-care workers, when tested, had very high concentrations of HBV in their blood * * *, and the health-care worker sustained a puncture wound while performing invasive procedures or had exudative or weeping lesions or microlacerations that allowed virus to contaminate instruments or open wounds of patients" (*ibid.*). We have also been advised by the Department of Health and Human Services that the agency is unaware of a single instance in which a patient has contracted the HIV infection from contact with a health care worker. Although these findings have not been gathered in the precise setting at issue here—a patient population that can, and often does, bite the health care professionals—they tend to confirm the evidence presented to the district court.

Consistent with currently available data, federal policy does not presently require health care workers in positions similar to those occupied by respondents to undergo mandatory testing for HIV and HBV infection. As a recent CDC recommendation notes, "[s]ince transmission of HIV from infected health-care workers performing invasive procedures to their patients has not been reported and would be expected to occur only very rarely, if at all, the utility of routine testing of such health-care workers to prevent transmission of HIV cannot be assessed" (*Recommendations* at 15S). The CDC guidelines also state that "[t]he question of whether workers infected with HIV—especially those who perform invasive pro-

cedures—can adequately and safely be allowed to perform patient-care duties or whether their work assignments should be changed must be determined on an individual basis" (*id.* at 16S). And the guidelines advise that adherence to the CDC recommendations—which do not include mandatory testing for HIV or HBV—"will minimize the risk of transmission of HIV and other blood-borne pathogens from health-care workers to patients during invasive procedures" (*id.* at 15S).

3. There is, of course, much left to learn about the diseases at issue, and policy, both federal and state, may lawfully take account of that uncertainty. As a general matter, moreover, courts should not second-guess empirical or policy judgments by States about the severity of a health problem and the strength of the governmental interest in finding a solution. Nor does the absence of an empirically verified health or safety problem ordinarily disable governments from taking preventive measures, fully consistent with the Fourth Amendment. See *National Treasury Employees Union* v. *von Raab*, 109 S. Ct. at 1395 (even though there were few instances of drug abuse by employees, Customs Service drug-testing program was constitutional because "the possible harm against which the Government seeks to guard is substantial").[5] But questions about the proper ap-

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[5] We note that the purpose of the testing program at issue in this case differs considerably from the purpose of the Customs Service program in *von Raab*. In *von Raab*, the absence of any significant record of drug abuse did not vitiate the purposes of the testing program—to ensure the integrity of the Service, and to deter employees from drug use in the future. In the present case, by contrast, the blood tests are designed solely to ensure the health of ENCOR patients; the

plication of Fourth Amendment principles to programs designed to test for infectious diseases should await a case in which they are appropriately presented. Because the questions presented in the petition are not at issue in this case, further review by this Court is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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trial court found, however, that on the present record there is little evidence that the patients' health is actually at risk. For that reason, unlike in *von Raab*, on the trial court's view of the evidence the ENHSA testing program might be thought not to serve its intended purpose.

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